



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2015-0440; FRL-9932-88-Region 4]**

**Air Plan Approval; North Carolina;**

**Conflict of Interest Infrastructure Requirements**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the North Carolina State Implementation Plan (SIP), submitted by the North Carolina Department of Environment and Natural Resources, Division of Air Quality (DAQ), on February 5, 2013, and supplemented on July 27, 2015. The submissions pertain to conflict of interest requirements of the Clean Air Act (CAA or Act) and were submitted to satisfy the infrastructure SIP sub-element related to the State board for the 2010 Nitrogen Dioxide (NO<sub>2</sub>) National Ambient Air Quality Standards (NAAQS), 2010 Sulfur Dioxide (SO<sub>2</sub>) NAAQS, 2008 8-hour Ozone NAAQS and 2008 Lead NAAQS. The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA, commonly referred to as an “infrastructure” SIP, which includes conflict of interest requirements. EPA is proposing to approve the portions of North Carolina’s 2010 NO<sub>2</sub> infrastructure SIP, 2010 SO<sub>2</sub> infrastructure SIP, 2008 8-hour ozone infrastructure SIP, and 2008 Lead infrastructure SIP as meeting these State board requirements. EPA is also proposing to

convert conditional approvals related to the State board for the 1997 8-hour ozone NAAQS, and the 1997 Annual Fine Particulate Matter (PM<sub>2.5</sub>) and 2006 24-hour PM<sub>2.5</sub> NAAQS to full approval under the CAA. EPA notes that all other applicable North Carolina infrastructure SIP elements for the above listed NAAQS have been or will be addressed in separate rulemakings.

**DATES:** Written comments must be received on or before [insert 30 days after date of publication in the Federal Register].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R04-OAR-2015-0440, by one of the following methods:

1. [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
2. E-mail: [R4-ARMS@epa.gov](mailto:R4-ARMS@epa.gov).
3. Fax: 404-562-9019.
4. Mail: “EPA-R04-OAR-2015-0440” Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Lynorae Benjamin, Chief, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office’s normal hours of operation. The Regional Office’s official hours of

business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No. “EPA-R04-OAR-2015-0440”. EPA’s policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through [www.regulations.gov](http://www.regulations.gov) or e-mail, information that you consider to be CBI or otherwise protected. The [www.regulations.gov](http://www.regulations.gov) website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

*Docket:* All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index.

Although listed in the index, some information may not be publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can be reached via electronic mail at [lakeman.sean@epa.gov](mailto:lakeman.sean@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) of the CAA are to be submitted by states within three years after promulgation of a new or revised NAAQS.

Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. EPA is proposing to approve: (1) North Carolina’s February 5, 2013, and July 27, 2015, submissions as satisfying the requirements of 128 of the CAA; and (2) the infrastructure SIP sub-element for section 110(a)(2)(E)(ii) related to the State board for the 2010 NO<sub>2</sub> NAAQS, 2010 SO<sub>2</sub> NAAQS, 2008 8-hour Ozone NAAQS and 2008 Lead NAAQS.<sup>1</sup>

Additionally, North Carolina’s February 5, 2013, and July 27, 2015, submissions satisfy EPA’s multiple conditional approvals of sub-element 110(a)(2)(E)(ii) published on February 6, 2012 (77 FR 5703), and October 16, 2012 (77 FR 63234), for the 1997 8-hour ozone NAAQS, and 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, respectively.<sup>2</sup> As a result of today’s proposed action related to the State’s submissions meeting section 128 of the CAA, EPA is proposing to convert the aforementioned conditional approvals to full approvals regarding North Carolina’s infrastructure requirements for section 110(a)(2)(E)(ii) for the 1997 8-hour ozone NAAQS, and 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS.

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<sup>1</sup> Sub-element 110(a)(2)(E)(ii) was previously submitted by North Carolina DAQ to EPA to satisfy the state board requirements for the referenced NAAQS. EPA is proposing through today’s rulemaking that the February 5, 2013, and July 27, 2015, final submissions in conjunction with the previously submissions for the 2010 NO<sub>2</sub> NAAQS (August 23, 2013), 2010 SO<sub>2</sub> NAAQS (March 18, 2014), 2008 8-hour Ozone NAAQS (November 2, 2012), and 2008 Lead NAAQS (July 20, 2012) satisfy the state board requirements for this sub-element.

<sup>2</sup> Sub-element 110(a)(2)(E)(ii) was previously submitted by North Carolina DAQ to EPA to satisfy the state board requirements for the referenced NAAQS. EPA is proposing through today’s rulemaking that the February 5, 2013, and July 27, 2015, final submissions in conjunction with the previous conditional approvals for the 1997 8-hour ozone NAAQS and 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS satisfy the state board requirements for this sub-element.

## **II. Requirements of Section 110(a)(2)(E)(ii) - Adequate Resources**

Sub-element 110(a)(2)(E)(ii) provides that each State “comply with the requirements respecting State boards under section [128 of the CAA]....” Section 128 provides that each SIP shall contain requirements that: 1) any board or body which approves permits or enforcement orders under the CAA shall have at least a majority of members who represent the public interest and do not derive a significant portion of their income from persons subject to permits or enforcement orders under the Act (hereafter “section 128(a)(1) requirements”); and, 2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed (hereafter “section 128(a)(2) requirements.”).

## **III. Requirements of Section 128**

Section 128 of the CAA requires that each state’s SIP contain provisions to address conflicts of interest for state boards or bodies that oversee CAA permits and enforcement orders and disclosure of conflict of interest requirements. Specifically, CAA section 128(a)(1) necessitates that each SIP require that at least a majority of any board or body which approves permits or enforcement orders represent the public interest and meet income restrictions. Subsection 128(a)(2) requires that the members of any board or body, or the head of an executive agency with similar power to approve permits or enforcement orders under the CAA, shall also

be subject to conflict of interest disclosure requirements. Furthermore, section 128 affords the Administrator of EPA the authority to incorporate conflict of interest provisions that go beyond those required by the CAA into the SIP when such provisions are submitted by a state as part of its implementation plan.

#### **IV. What is EPA’s analysis of how North Carolina addressed the Section**

##### **110(a)(2)(E)(ii) Infrastructure requirement?**

For purposes of section 128(a)(1), as of October 1, 2012, North Carolina has no boards or bodies with authority over air pollution permits or enforcement actions. The authority to approve CAA permits or enforcement orders are instead delegated to the Secretary of the Department of Environment and Natural Resources (DENR) and his/her delegatee. As such, a “board or body” is not responsible for approving permits or enforcement orders in North Carolina, and the requirements of section 128(a)(1) are not applicable.

For purposes of section 128(a)(2), EPA is proposing to approve North Carolina’s revisions submitted by DAQ, on February 5, 2013, and amended on July 27, 2015. Section 128(a)(2) requires that any potential conflicts of interest by members of a board or body that approves permits or enforcement orders under the CAA, or head of executive agency with similar powers, be adequately disclosed. Subsection 128(a)(2) applies to all states, regardless of whether the state has a multi-member board or body that approves permits or enforcement orders under the CAA. In instances where the head of an executive agency delegates his or her power to approve permits or enforcement orders, or where the statutory authority to approve permits or enforcement orders is nominally vested in another state official, the requirement to adequately disclose potential conflicts of interest still applies. As noted above, the Secretary of DENR and his/her delegates have the authority to issue CAA permits and enforcement orders in North

Carolina and are subject to conflict of interest disclosure procedures. Under these procedures, such individuals are required to file a certification disclosing sources of income and relationships that constitute a potential conflict of interest each year, which are subject to public inspection. If circumstances change such that the certification is no longer complete or accurate, they are required to promptly file a new certification. In addition, disclosure of potential conflicts of interest are required for each final decision, which may merit recusal from the particular matter. If recusal is determined not to be necessary, the disclosure of potential conflict of interest is made part of the public record. North Carolina's revision would incorporate these conflict of interest disclosure procedures and a certification form into its SIP to address section 128(a)(2) requirements.

On October 1, 2012, North Carolina's enacted state law that involved changes to how contested DENR cases are handled. Previously these matters were heard on appeal by an Administrative Law Judge (ALJ) in the State's Office of Administrative Hearings (Administrative Procedures Act-type review). The ALJ would render a decision that would then go before the State's Environmental Management Commission (EMC) for a final agency decision. Under the new state law, the EMC's role is eliminated and instead the ALJ decision constitutes the final agency action which could then be appealed by either party to state superior court. The Director of the Office of Administrative Hearings appoints an ALJ to preside over contested matters such as appeals of CAA permits and enforcement orders. The Office of Administrative Hearings is an executive agency with quasi-judicial functions.

In 1978, following the adoption of the section 128 provisions, EPA published a guidance to the states providing suggested definitions that the Agency viewed as representing the "minimum level of stringency necessary to meet the requirements of section 128." The guidance



defined “Board or body” as including instrumentalities “authorized to approve permits or enforcement orders under the CAA, in the first instance or on appeal.” Because section 128(a)(2) applies to boards or bodies, or the heads of executive agencies *with similar powers*, EPA interprets the inclusion of appeals within the definition of board or bodies in the 1978 guidance as likewise applying to appeals of matters handled initially by the head of an executive agency. Further, as stated above, if the statutory scheme vests final approval authority for CAA permits and orders with a state official other than the head of an executive agency, EPA interprets section 128(a)(2) as applying to that state official as well because they are functionally equivalent.

North Carolina’s July 27, 2015, supplement addresses the section 128(a)(2) conflict of interest disclosure requirements for ALJs through Chapter 7A section 754 of the North Carolina General Statutes, which contains provisions related to the Office of Administrative Hearings addressing these requirements for the ALJ. Specifically, North Carolina is requesting that the following paragraph of 7A-754 stating “*The Chief Administrative Law Judge and the administrative law judges shall comply with the Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the National Conference of Administrative Law Judges, Judicial Division, American Bar Association, (revised August 1998), as amended from time to time, except that the provisions of this section shall control as to the private practice of law in lieu of Canon 4G, and G.S. 126-13 shall control as to political activity in lieu of Canon 5.*” be adopted into the SIP. The *Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the National Conference of Administrative Law Judges, Judicial Division, American Bar Association, (revised August 1998)*, requires ALJs to act impartially, which broadly includes financial considerations, relationships, and other associations. ALJs are

prohibited from participating in any matter in which the ALJs impartiality might reasonably be questioned or the ALJ must disclose the potential conflict of interest on the record in the proceeding. In the case of such disclosures, the parties to the matter must agree that the disclosed conflict of interest is immaterial before the ALJ may continue to participate in the matter. EPA has determined that the provision of Chapter 7A section 754 of the North Carolina General Statutes submitted for incorporation in the SIP provides for adequate disclosure of potential conflicts of interest for any ALJ that will make final decisions on CAA permits and enforcement orders. Therefore, EPA is proposing to approve the North Carolina SIP revision related to section 128(a)(2). EPA is also proposing to approve the portions of North Carolina's 2010 NO<sub>2</sub> infrastructure SIP (submitted on August 23, 2013), 2010 SO<sub>2</sub> infrastructure SIP (submitted on March 18, 2014), 2008 8-hour ozone infrastructure SIP (submitted on November 2, 2012), and 2008 Lead infrastructure SIP (submitted on July 20, 2012) related to 110(a)(2)(E)(ii).

Additionally, as mentioned above, EPA conditionally approved North Carolina's infrastructure submissions for the 1997 8-hour ozone NAAQS, 1997 annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS as they related to 110(a)(2)(E)(ii) because provisions related to CAA 128 were not included in North Carolina's SIP. As a result of EPA's proposed approval of North Carolina's February 5, 2013, and July 27, 2015, submittals, EPA is also proposing to convert EPA's previous conditional approval of North Carolina's infrastructure submissions for the 1997 8-hour ozone NAAQS, 1997 annual PM<sub>2.5</sub> NAAQS and the 2006 24-hour PM<sub>2.5</sub> NAAQS as they relate to 110(a)(2)(E)(ii) to full approval.

## **V. Proposed Action**

As described above, EPA is proposing to approve North Carolina's February 5, 2013, and July 27, 2015, submissions concerning conflict of interest requirements related to CAA section 128(a)(2). Specifically, today, EPA is proposing to approve North Carolina's 110(a)(2)(E)(ii) submission as it relates to the Secretary of the DENR and his/her delegatee that approve permit or enforcement orders described at section 110(a)(2) of the CAA. EPA is also proposing to approve North Carolina's July 27, 2015, 110(a)(2)(E)(ii) submission as it relates to appealed matters decided by ALJs. Additionally, EPA is proposing to approve the portions of North Carolina's 2010 NO<sub>2</sub> infrastructure SIP, 2010 SO<sub>2</sub> infrastructure SIP, 2008 8-hour ozone infrastructure SIP, and 2008 Lead infrastructure SIP related to 110(a)(2)(E)(ii). EPA is also proposing to convert previous conditional approvals for North Carolina's infrastructure submissions for the 1997 8-hour ozone NAAQS, 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS addressing CAA section 110(a)(2)(E)(ii) requirements to approval.

## **VI. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249,

November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate Matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 12, 2015.

Heather McTeer Toney

Regional Administrator,

Region 4.

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